TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1958

No. 248

FARMERS EDUCATIONAL AND COOPERATIVE UNION OF AMERICA, NORTH DAKOTA DIVISION, A CORPORATION, PETITIONER,

vs.

WDAY, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

PETITION FOR CERTIORARI FILED AUGUST 2, 1958
CERTIORARI GRANTED OCTOBER 13, 1958

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN THE DISTRICT COURT OF CASS COUNTY STATE OF NORTH DAKOTA

FARMERS EDUCATIONAL AND COOPERATIVE UNION OF AMERICA, NORTH DAKOTA DIVISION, a corporation, Plaintiff,

v.

A. C. TOWNLEY and WDAY, INC., a corporation, Defendants.

COMPLAINT.

The Plaintiff complains of the Defendants and alleges:

I.

That the Plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of North Dakota, with a principal office and place of business located at Jamestown, North Dakota;

II.

That the Defendant, WDAY, Inc., is a corporation duly organized and existing under and by virtue of the laws of the State of North Dakota, with an office and principal place of business located at Fargo, North Dakota;

III.

That the Defendant, WDAY, Inc., was at all times mentioned herein engaged in radio and television broadcasting from its studios in Fargo, North Dakota, under a license duly issued by the Federal Communications Commission;

LV. (sic)

That on or about October 29, 1956, and in the forenoon of said day, the Defendants, using and employing the equipment and facilities of the Defendant, WDAY Inc., inten-

tionally, willfully, maliciously, knowingly and wrongfully photographed, published, reproduced, filmed, uttered, copied and exhibited the words and visual image of the Defendant, A. C. Townley, which words were false, defamatory, and unprivileged and were as follows:

[fol. 2] "TO: North Dakota Republicans, Farmers, Bankers and Businessmen.

"The Farmers Union program fully carried out as planned not as it is planned by the farmer members, but as it is planned by the Farmers Union dictators, would establish a Communist Farmers Union Soviet right here in North Dakota.

"This Farmers Union is now rapidly developing on your main street right here under your nose. This Farmers Union has already taken over vast business enterprise and threatens every businessman in North Dakota.

"For ten years, Senator Young has used the power and prestige of the high office that he holds to serve this Farmers Union. He has not raised his voice or hand to stay the communist viper gnawing at your private ownership and liberty. On the contrary, Young says everything and does everything the Farmers Union tell him to do or say—Democrat Alex Lind, Democrat Glenn Talbott, and Democrat Bill Thatcher—tell him what to say and how to vote on every matter that concerns the Farmers Union.

"In a letter to the voters dated October 10, 1956, Milton Young says, "The Congressional Record will show that I have led the fight for 90% parity and I have letters from M. W. Thatcher thanking me."

"Milton Young has no letter from President Eisenhower thanking him for supporting the Republican farm program because the bogus Republican, Milton Young, supports the bogus Democrat farm program and gets his orders from the Democrat Farmers Union. Young is Republican in name only. His works are Communist, Democrat, Farmers Union works.

"Young and Burdick both support the Democrat Farmer program. Both men take orders from Com-

munist controlled Democrat Farmers Union and now this amazing fact—Communist infiltration and power has gone so far in North Dakota that the Democratic Party supports 100% the Democratic Farmers Union candidate and the Republican Party supports 90% the Democratic Farmers Union candidate. The Communists can't lose unless the Americans wake up and wake up fast.

[fol. 3] "Mr. Republican farmer, Republican banker, Republican businessman, do you vote and work Republican with Eisenhower for the Republican farm program and against the Farmers Union soviet or do you now still walk hand in hand with communist Farmers Union dictators—communist Democrat Glenn Talbott, Democrat Bill Thatcher and their willing servant, Milton Young, to build this deadly tyranny.

"If you do, then the jig is up and the communist Farmers Union soviet is here for sure. I will talk over KFYR at 7:30 and KFGO at 8:30 every night this week. Also, Monday night before you vote. Please get your friends to listen."

V.

That thereafter in the afternoon of said day, the image and words of the Defendant, A. C. Townley, were again intentionally, willfully, maliciously, knowingly and wrongfully published, reproduced, uttered and exhibited to the officers, management, and employees of the Defendant, WDAY, Inc., at the studio of the said Defendant, WDAY, Inc., by the Defendants;

VI.

That hereafter in the evening of said day, the image and words of the Defendant were again intentionally, willfully, maliciously, knowingly, and wrongfully published, reproduced, uttered and exhibited over television broadcasting equipment and facilities through duly authorized channel No. 6, from Fargo, North Dakota, to thousands of listeners and viewers in North Dakota, South Dakota, and Minnesota, by the said Defendants;

VII.

That the statements and the visual and sound broadcasting thereof which refer to Farmers Union were and are directed to the Plaintiff and were deliberately designed to and did convey to the listeners and viewers of the said false and defamatory matter visual image and words of the Defendant, A. C. Townley, the fact that the person or legal entity to whom said statements referred was this Plaintiff;

VIII.

That the aforesaid statement:

> "The Farmers Union program fully carried out as planned, not as it is planned by farmer members, but as it is planned by the Farmers Union dictators, would establish a Communist Farmers Union Soviet right here in North Dakota."

[fol. 4] was deliberately designed to and did convey the impression and statements that the Plaintiff was unpatriotic, guilty of treasonable conduct, violated the Constitution and law of the land, was engaged in illegal and immoral activities, and held the Plaintiff up to ridicule, contempt, hatred and obliquy, caused the Plaintiff to be shunned, and avoided, and injured it in its occupation, and constituted libel and slander per se.

IX.

That the aforesaid statement:

> "Both men take orders from Communist controlled Democrat Farmers Union and now this amazing fact—Communist infiltration and power has gone so far in North Dakota that the Democratic Party supports 100% the Democrat Farmers Union candidate and the Republican Party supports 90% the Democratic Farmers Union candidate. The Communists can't lose unless the Americans wake up and wake up fast."

was deliberately designed to and did convey the impression and statements that the Plaintiff was unpatriotic, guilty

of treasonable conduct, violated the Constitution and law of the land, engaged in illegal and immoral activities, and held the Plaintiff up to ridicule, contempt, hatred, obliquy, caused the Plaintiff to be shunned and avoided and injured it in its occupation and constituted libel and slander per se;

X.

That the aforesaid statement:

> "Mr. Republican farmer, Republican banker, Republican businessman, do you vote and work Republican with Eisenhower for the Republican farm program and against the Farmers Union soviet or do you now still walk hand in hand with communist Farmers Union dictators—"

was deliberately designed to and did convey the impression and statements that the Plaintiff was unpatriotic, guilty of treasonable conduct, violated the constitution and law of the land, engaged in illegal and immoral activities, and held the Plaintiff up to ridicule, contempt, hatred, obliquy, caused the Plaintiff to be shunned and avoided and injured in its occupation, and constituted libel, and slander per se;

XI.

That the aforesaid statement:

> "If you do, then the jig is up and the communist Farmers Union soviet is here for sure."

[fol. 5] was deliberately designed to and did convey the impression and statements that the Plaintiff was unpatriotic, guilty of treasonable conduct, violated the Constitution and laws of the land, engaged in illegal and immoral activities, and held the Plaintiff up to ridicule, contempt, hatred, obliquy, caused the Plaintiff to be shunned and avoided and injured in its occupation, and constituted libel and slander per se;

XII.

That because of and as a natural and proximate consequence of the publication uttering, and broadcasting of the foregoing statements, the Plaintiff has and will suffer special damages on account of loss of members and loss of membership dues and contributions in the sum of Fifty Thousand ($50,000.00) Dollars;

XIII.

That because of and as the necessary and proximate result of said malicious libel and slander uttered and broadcasted and as set forth in the foregoing statements, the Plaintiff has been injured in its work and occupation and has actually and necessarily been exposed to the hatred, contempt, ridicule and obliquy that is accorded by society generally to those labeled or characterized as Communists all to the Plaintiff's general damage in the sum of Fifty Thousand ($50,000.00) Dollars;

Wherefore, the Plaintiff prays for Judgment against the Defendants, and each of them, for the sum of Fifty Thousand ($50,000.00) Dollars special damage; for the sum of Fifty Thousand ($50,000.00) Dollars general damage; and for the further sum of Fifty Thousand ($50,000.00) Dollars as exemplary damages, making a total sum of One Hundred Fifty Thousand ($150,000.00) Dollars, and together with its costs and disbursements herein.

Dated this 14th day of January, 1957.

/s/ Quentin N. Burdick, 310 Tenth Avenue South, Fargo, North Dakota.

/s/ J. F. X. Conmy, 212 Fourth Street, Bismarck, North Dakota, Attorneys for the Plaintiff.

[fol. 6]

IN DISTRICT COURT OF CASS COUNTY

[Title omitted]

SUMMONS AND SHERIFF'S RETURN

The State of North Dakota to the Above Named Defendants:

You are hereby summoned to answer the Complaint of the Plaintiff in the above entitled action, a copy of which said Complaint is hereto attached and herewith served upon you, and to serve a copy of your Answer upon the subscribers at their office in the Dakota National Bank Building in the City of Bismarck, Burleigh County, North Dakota, within thirty (30) days after the service of this Summons upon you exclusive of the day of such service; and in case of your failure to appear or answer as above required, Plaintiff will take Judgment against you by default for the relief demanded in the Complaint.

Dated this 14th day of January, 1957.

/s/ Quentin N. Burdick, 310 Tenth Avenue South, Fargo, North Dakota.
/s/ J. F. X. Conmy, 212 Fourth Street, Bismarck, North Dakota, Attorneys for the Plaintiff.

[fol. 7] I, *Chas. Y. Punton*, Sheriff of said Cass County, North Dakota, hereby certify and return that the *Summons and Complaint* in the above entitled action which *are* hereto attached, came into my hands for service on the *21st* day of *January*, 1957, and that on the *21st* day of *January*, 1957, within said County of Cass, I served the said *Summons and Complaint* on *WDAY, Inc., a corporation*, Defendant in said action, by delivering to and leaving with *Tom Barnes, General Manager of WDAY, Inc., a corporation* said defendant personally, a true and correct copy of said Summons and Complaint.

Italicized material is underlined in the original.

that all laws of a general nature shall have uniform operation in that the said statute unreasonably favors radio and television station, over other forms of communication media.

V.

That Section 14-0209 of the 1953 Supplement to the NDRC of 1943 is likewise void and invalid, in that the Congress of the United States has occupied the interstate field of radio and television communications, and has not legislated immunity from actions for defamation.

As to the Plaintiff's demurrer to the defendant's, [fol. 25] WDAY, Inc., second defense, that such defense does state facts sufficient to constitute a defense, in that:

I.

The publication complained of is a privileged publication within the provisions of Chapter 14-02 (sic) NDRC 1943.

II.

The fact that the broadcast complained of dealt with different matters from that which was referred to by other candidates for the U. S. Senate and was the only speech made by the defendant, A. C. Townley, over the facilities of WDAY, Inc. did not remove such broadcast from the compulsion, protection or authorization of Section 315 of the Communications Act of 1934.

III.

That Section 315 of the Communications Act of 1934 does grant immunity to the defendant, WDAY, Inc., for the defamation alleged in the present action and is not unconstitutional, invalid and void and in violation of the Fourteenth Ammendment (sic) of the Constitution of the United States, nor does it contravene the due process clause of the Fourteenth Ammendment (sic) or deprive the plaintiff of a substantive right to protect its property, including its reputation or deny to the plaintiff equal

protection of the law, under the equal protection clause of the Fourteenth Ammendment. (sic)

IV.

That Section 315 of the Communications Act of 1934 is not unconstitutional, invalid and void in violation of the Fifty (sic) Ammendment (sic) to the Constitution of the United States of America as contravening the due process clause of that Ammendment (sic) and depriving the plaintiff of liberty and property and a substative (sic) right to protect its property, including its reputation, under the Fifty (sic) Ammendment. (sic)

V.

That that part of Section 315 of the Communications Act of 1934 which provides that "No obligation is imposed on any licensee to allow the use of its station by any such candidate" is inapplicable in the present action since the defendant WDAY, Inc. had already permitted the use of its facilities by other candidates than the defendant, A. C. Townley.

[fol. 26]

VI.

That the actual participation of the defendant, WDAY, Inc. in the mechanical preparation, taping and recording of the script and film necessary for the boradcast (sic) complained of knowing the statements therein were false and defamatory if not true constitutes a "use" of the defendant's, WDAY, Inc., facilities under the terms of Section 315 of the Communications Act of 1934 and did not remove the defendant WDAY, Inc., from the compulsion, authorization and protection of the act.

VII.

This Court having jurisdiction of this action and having declared the law, and the defendant, WDAY, Inc., having moved for judgment dismissing the action as to itself, does now in accordance with such declaration grant such motion for dismissal.

Let Judgment Be Entered According to the Attached Form of Judgment Which Is Hereby Approved.

Dated this 23rd day of May, 1957.

By the Court, John C. Pollock, Judge of the District Court.

[fol. 27]

IN DISTRICT COURT OF CASS COUNTY

FARMERS EDUCATIONAL AND COOPERATIVE UNION OF AMERICA, NORTH DAKOTA DIVISION, a corporation, Plaintiff,

v.

A. C. TOWNLEY and WDAY, INC., a corporation, Defendants.

JUDGMENT—May 23, 1957

This matter came on for final hearing and determination before the Court; and it appearing to the Court that heretofore this Court had sustained in part the plaintiff's demurrer to the defendant's, WDAY, Inc., answer and overruled such demurrer in part and the parties having elected to plead no further and the defendant, WDAY, Inc., having moved for judgment, and the Court having considered all the records and files herein and being fully advised in the premises by counsel for the plaintiff and the defendant, WDAY, Inc., and the Court having made and filed herein its Findings of Fact, Conclusions of Law and Order for Judgment, it is now in accordance therewith

Ordered, Adjudged and Decreed, That the complaint herein be dismissed as to WDAY, Inc. without costs to either party.

Witness the Honorable John C. Pollock, Judge of the District Court, my hand, and the seal of said Court this 23rd day of May, 1957.

Theo. L. Hanson, Clerk of the District Court.

By Florence Bjordahl, Deputy.

(Seal)

[fol. 28]

IN DISTRICT COURT OF CASS COUNTY

[Title omitted]

STIPULATION RE RECORD—May 23, 1957

It is hereby stipulated and agreed, by and between the plaintiff and the defendant, WDAY, Inc., in the above entitled action, through their respective attorneys, that all of the records, files, pleadings, orders, findings of fact, conclusions of law, order for judgment, judgment, order overruling the plaintiff's demurrer to the second defense in the answer of the defendant, WDAY, Inc., and sustaining the plaintiff's demurrer to the first defense in the answer of the defendant, WDAY, Inc., demurrer, and demand for a trial de novo in the Supreme Court, including the judgment roll herein, may be certified, allowed and settled by the above named Court as a true, full and correct record of the proceedings had herein, and a true, full and correct statment (sic) of the case.

That the time for presenting said record for certification is hereby waived by the parties hereto, and that the same may be presented forthwith to the Court for certification, and that the Order settling the statement of the case may also be made forthwith and without notice.

Quentin N. Burdick, Attorney for Plaintiff.

Harold W. Bangert, Attorney for Defendant, WDAY, Inc.

Dated this 23rd day of May, 1957.

[fol. 29]

IN DISTRICT COURT OF CASS COUNTY

[Title omitted]

CERTIFICATE AND ORDER OF TRIAL COURT IDENTIFYING RECORDS AND SETTLING STATEMENT OF THE CASE—May 23, 1957

I, John C. Pollock, one of the Judges of the First Judicial District of the State of North Dakota, and the Judge who

tried the above entitled action, between the Plaintiff and the defendant, WDAY, Inc., have read and filed the Stipulation between counsel for the respective parties, having been entered into setting forth, among other things, that the time to present the records and proceedings for certification is waived by the parties hereto, which written stipulation is made a part of this record on appeal herein, and which stipulation provided that the record and proceedings may be represented forthwith for certification, and that upon said stipulation, and upon all the records, files, and proceedings had herein, this Order and Certificate settling statement of the case is made forthwith upon the request of counsel.

I hereby certify that all of the records, files, pleadings, orders, findings of facts, conslusions (sic) of law, order for judgment, judgment, order overruling the Plaintiff's demurrer to the second defense in the answer of the defendant, WDAY Inc., and sustaining the plaintiff's demurrer to the first defense in the answer of the defendant, WDAY, Inc., demurrer, and demand for trial de novo in the Supreme Court, including the judgment roll herein are hereby identified, certified, allowed, and settled as a full and correct record of the proceedings had herein, and a true, full, and correct settled statement of the case herein and made a part of the judgment roll.

By the Court: John C. Pollock, Judge of said District Court.

Dated this 23rd day of May, 1957.

[fol. 30]

IN DISTRICT COURT OF CASS COUNTY

[Title omitted]

NOTICE OF APPEAL—May 23, 1957

To the above named defendant, WDAY, Inc., a corporation, and Harold W. Bangert, its attorney:

You Will Please Take Notice that the plaintiff appeals to the Supreme Court of the State of North Dakota from

that certain Judgment made and entered in the above entitled matter on the 23rd day of May, 1957, and the whole thereof, and demands a trial de movo (sic) thereon.

You will also please take notice that the appellant's undertaking, demand for trial de novo and assignments and specifications of error are hereto attached.

Quentin N. Burdick, Attorney for Appellant, 310 10th Ave. S. Fargo, N. Dak.
James F. X. Conmy, Attorney for Appellant, 212 Fourth Street, Bismarck, N. Dak.

Dated this 23rd day of May, 1957.

[fol. 31] UNDERTAKING ON APPEAL (omitted in printing.)

[fol. 33]

IN DISTRICT COURT OF CASS COUNTY

[Title omitted]

ASSIGNMENTS AND SPECIFICATIONS OF ERROR—May 23, 1957

Comes now the appellant and assigns and specifies the following errors:

I.

That the Court erred in overruling the plaintiff's demurrer to the second defense in the answer of the defendant WDAY, Inc.

II.

That the Court erred in overruling the plaintiff's demurrer to the answer of the defendant, WDAY, Inc.

III.

That Findings of Fact VII VIII & IX. are not in accordance with, and are contrary to, law

IV.

That Conclusions of Law I, II, III, IV, V, VI and VII of the second defense are not in accordance with, and are contrary to, law.

V.

That the Order for Judgment is not in accordance with, and is contrary to, law.

VI.

That the Judgment entered herein is not in accordance with, and is contrary to law.

VII.

That the Findings of Fact, Conclusions of Law, Order for Judgment and Judgment, referred to in paragraphs III, IV, V, and VI above, are not support (sic) by, or [fol. 34] founded upon, the facts and admitted evidence in the case.

VIII.

That the Court erred in failing and refusing to find that said Section 315 of the Communications Act was not applicable to this case.

IX.

That the Court erred in failing and refusing to find that said Section 315 did not grant or give immunity from actions of defamation to the defendant, WDAY, Inc.

X.

That the Court erred in failing and refusing to find that said Section 315 was unconstitutional, invalid and void and in violation of the Fourteen (sic) Amendment to the Constitution of the United States of America, and particularly to the due process and equal protection clauses of said Amendment.

XI.

That the Court erred in failing and refusing to find that said Section 315 was unconstitutional, invalid and void and in violation of the Fifth Amendment to the Constitution of the United States of America, particularly in that it violated the due process clause of said Fifth Amendment, and it deprived the plaintiff of liberty and property and a

substantive right to protect its property, include its reputation, under said Fifth Amendment.

XII.

That the Court erred in failing and refusing to find that said Section 315 did not compel or authorize the defendant WDAY, Inc., to broadcast the said speech of the defendant, A. C. Townley, nor did it protect or shield the defendant, WDAY, Inc., under the facts in ths (sic) case.

XIII.

That the Court erred in failing and refusing to find that there was no obligation imposed upon the defendant, WDAY, Inc., to allow the use of its station to the defendant, A. C. Townley.

[fol. 35]

XIV.

That the Court erred in failing and refusing to find that the defendant WDAY, Inc., by actually particpating (sic) in the mechanical preparation, taping and recording of the script and film necessary for the broadcast complained of, and knowing the statements therein were false and defamatory, and thereafter permitting and allowing said broadcast, is not shielded or protected by the terms and provisions of said Section 315.

Quentin N. Burdick, Attorney for Appellant, 310 10th Ave. S., Fargo, N. Dak.
James F. X. Conmy, Attorney for Appellant, 212 Fourth St., Bismarck, N. Dak.

Dated this 23rd day of May, 1957.

[fol. 36]

IN DISTRICT COURT OF CASS COUNTY

[Title omitted]

DEMAND FOR TRIAL DE NOVO IN SUPREME COURT—
May 23, 1957

Comes now the plaintiff, in the above entitled action, a (sic) demands a trial de novo in the Supreme Court of the State of North Dakota upon the appeal herein to the said Supreme Court.

Quentin N. Burdick, Attorney for Plaintiff, 310 10th Ave. S., Fargo, N. Dak.
James F. X. Conmy, Attorney for Plaintiff, 212 4th St., Bismarck, N. Dak.

Dated this 23rd day of May, 1957.

[fol. 37] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 38]

IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

FARMERS EDUCATIONAL AND COOPERATIVE UNION OF AMERICA, NORTH DAKOTA DIVISION, a corporation, Plaintiff and Appellant,

—v.—

WDAY, INC., a corporation, Defendant and Respondent.

OPINION—April 3, 1958

1. Under Federal Communications Act of 1934, Title 47 USCA, Section 301, Telegraphs, Telephones and Radiotelegraphs, complete regulatory power and control over channels of interstate radio and television communication are vested in the United States exclusive of State action.

2. The inhibition against censorship imposed on broadcasting stations by Section 315, Title 47 USCA grants immunity to such stations from liability for defamatory statements made by candidates where such statements are germane to the political issues discussed by such candidates.

3. For reasons stated in the opinion it is held that Section 315, Title 47, USCA does not violate the Fifth and Fourteenth Amendments to the Constitution of the United States.

(Syllabus by the Court)

Appeal from the District Court of Cass County, Honorable John C. Pollock, Judge.

Affirmed.

Opinion of the Court by Sathre J.

Quentin N. Burdick, 310—10th Avenue South, Fargo, North Dakota, Attorney for Appellant.

Bangert & Bangert, 207 N. 5th Street, Fargo, North Dakota, Attorneys for Respondents.

Douglas A. Anello, Walter R. Powell, Jr., Walter J. Murphy, Jr., Amicus Curiae, Washington, D. C.

[fol. 39] Farmers Educational and Cooperative Union of America, v. A. C. Townley and WDAY, Inc. a Corporation

Sathre, J. The plaintiff is a corporation duly organized and existing under the laws of the State of North Dakota, with a principal office and place of business at Jamestown, North Dakota.

The defendant, WDAY, Inc., is a corporation duly organized and existing under and by virtue of the laws of the State of North Dakota with its office and principal place of business located at Fargo, North Dakota. It is engaged in radio and television broadcasting from its studios at Fargo, North Dakota, under license duly issued by the Federal Communications Commission.

At the general election of North Dakota in 1956 Milton R. Young, Quentin Burdick, and A. C. Townley were duly qualified candidates for the office of United States Senator.

Some time prior to October 29, 1956, two of said candidates for the office of U. S. senator, Milton R. Young and Quentin Burdick made arrangements with the defendant WDAY to use and did use its facilities and equipment for the photographing and recording of political speeches related to the respective candidates which photographic film and recordings through conventional television processes were broadcast by WDAY, the defendant.

Thereafter Townley the third candidate for U. S. Senator from North Dakota requested the same opportunity to use the broadcasting facilities and equipment of the defendant WDAY as had been accorded Milton R. Young and Quentin Burdick and presented to the defendant WDAY a script of the broadcast which he proposed to make over such facilities. WDAY notified Townley that it believed certain statements in the proposed script were false and that if such statements were, in fact false, they were libelous and that it would broadcast the proposed [fol. 40] script only if Townley demanded that it be broadcast under the provisions of Section 315 of the Federal Communications Act, the same being Section 315 U. S. Code Annotated, Title 47.

Townley made the demand under said Section 315 and the script was broadcast through the television and radio equipment of the defendant WDAY. Among other things the script contained the following statements:

> "The Farmers Union program fully carried out as planned, not as it is planned by farmer members, but as it is planned by the Farmers Union dictators, would establish a Communist Farmers Union Soviet right here in North Dakota."
>
> "Both men take orders from Communist controlled Democrat Farmers Union and now this amazing fact —Communist infiltration and power has gone so far in North Dakota that the Democratic Party supports 100% the Democrat Farmers Union candidate and the Republican Party supports 90% the Democratic Farmers Union candidate. The Communist can't lose unless the Americans wake up and wake up fast."
>
> "Mr. Republican farmer, Republican banker, Republican businessman, do you vote and work Republican

with Eisenhower for the Republican farm program and against the Farmers Union Soviet or do you now still walk hand in hand with communist Farmers Union dictators."

Thereafter plaintiff brought this action against the defendants claiming that the contents of the Townley script was libelous per se and that the plaintiff thereby sustained special as well as general damages by reason of the broadcast of said script.

The complaint alleges that on the 29th day of October 1956, in the evening of said day, the defendants intentionally, wilfully, maliciously, knowingly and wrongfully published, reproduced and uttered the said libelous and defam- [fol. 41] atory statements over the television and broadcasting equipment and facilities of the defendant WDAY through channel 6, at Fargo, North Dakota; that the statements so published and broadcast by the defendants were directed to the plaintiff, and were deliberately designed to and did convey to the thousands of listeners and viewers of the said false and defamatory matter, and visual image of the defendant A. C. Townley that the person or legal entity to whom said statements referred was the plaintiff, and did convey the impression to thousands of listeners and viewers that plaintiff was unpatriotic, guilty of treasonable conduct, violated the constitution and law of the land, and was engaged in illegal and immoral activities, and held the plaintiff up to ridicule, contempt and obloquy, and caused plaintiff to be shunned and injured in its occupation, and said statements so broadcast were libel and slander per se; that plaintiff has suffered and will suffer special damages on account of loss of membership dues and contributions in the sum of $50,000.00 and general damages in the sum of $50,000.00. The defendant A. C. Townley answered admitting making the broadcast complained of, but denied that same constituted libel and slander as against the plaintiff.

The defendant WDAY answered separately and admitted that the Townley script was broadcast through its television and broadcasting facilities; but alleged as a first defense that it was absolved of any liability for

any damages under the provisions of Section 14-0209, 1953 Supp. NDRC 1943, which Section is as follows:

> "The owner, licensee or operator of a visual or sound radio broadcasting station or network of stations, and the agents or employees of any such owner, licensee or operator, shall not be liable for any damages for any defamatory statement published or uttered in or as a part of a visual or sound radio broadcast, by one other than such owner, licensee or operator, or agent or employee thereof."

As a second defense it alleged that under the provisions of Section 315 of the Communications Act of 1934, U.S. [fol. 42] Code Annotated Chapter 47, it had no power of censorship; that under said statute it was its mandatory duty to publish the script complained of, and that if it should fail to comply with said statute the same would be grounds for the Federal Communication Commission to penalize the defendant by refusing to renew its license; that by reason of the premises and said Section 315 and the regulations thereunder promulgated by the Federal Communication Commission, the defendant was without fault, and entitled to a dismissal of the action. Said Section 315 is as follows:

> "If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station; PROVIDED, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed upon any licensee to allow the use of its station by any such candidate."

The plaintiff demurred to the first defense on the grounds that it did not state facts sufficient to constitute a defense, and that the said Section 14—0209 NDRC 1943, 1953 Supp. is unconstitutional, invalid and void in that it violates Section 9 and 22 of the Constitution of the State of North Dakota.

Plaintiff demurred to the second defense on the grounds that if said Section 315 of the Communications Act is applicable, it does not grant immunity to the defendant WDAY, Inc. from actions for defamation, and if construed as granting immunity, said Act would be unconstitutional and void and in violation of the Fourteenth Amendment to the Constitution of the United States and would contravene the due process clause of said Amendment, and deprive plaintiff of a substantive right to protect its property, including its reputation; that if said Section 315 is applicable, it would be void and unconstitutional under the Fifth Amendment to the Constitution of the United States, and deprive plaintiff of liberty and property and a substantive [fol. 43] right without due process of law; and that the answer does not state facts sufficient to constitute a defense.

On the issues thus framed the matter came on for hearing, pursuant to agreement by the parties, in the district court of the first judicial district, at Fargo, North Dakota, before the Honorable John C. Pollock, one of the judges of said district court. After such hearing the court made its order sustaining plaintiff's demurrer to the first defense of the defendant WDAY, but overruled the demurrer to the second defense.

No appearance was made for or on behalf of the defendant A. C. Townley.

Neither the plaintiff nor the defendant elected to plead further. The defendant WDAY, Inc. moved for judgment in its favor for dismissal of the action. The motion was granted and the court made findings of fact, conclusions of law, and ordered judgment in favor of the defendant WDAY for dismissal of the action. Judgment was entered accordingly. The plaintiff appealed from the judgment and demanded a trial de novo in this court.

In its order sustaining the demurrer to the first defense of the defendant WDAY the court held that Section 14-0209, 1953 Supp. NDRC 1943, was unconstitutional and void under Sections 9, 11 and 22 of the Constitution of the State of North Dakota. The defendant WDAY takes no exception to that part of the order, and therefore the question as to the constitutionality of Section 14-0209 NDRC 1943, is not before us on this appeal.

It is conceded by the defendant WDAY that the language in the Townley speech complained of by plaintiff is libelous per se; but it claims immunity under Section 315 of the Federal Communications Act. It is contended that in the matter of the Application of Port Huron Broadcasting [fol. 44] Co. Docket No. 6987, 1948, (4RR1) the Federal Communication Commission expressed the opinion that Section 315 relieved broadcasters from liability for defamation and that such opinion had the force of law. The proviso in Section 315 prohibits censorship of the material to be broadcast in the following language:

> "Provided, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section."

In the Port Huron case it appears that the Broadcasting Company had adopted a policy of selling time to the various candidates for political office and had arranged to broadcast a series of talks by three candidates. But after the station management had examined the script of one of such candidates and had discovered the allegedly libelous nature of the script, broadcast thereof was refused. The Communication Commission held that suppression of the speech was a complete exercise of censorship in violation of the provisions of Section 315.

We quote the following excerpts from the text of the opinion of Communication Commission in the Port Huron case:

> "For as we read the provisions of Section 315, the prohibition contained therein against censorship in connection with political broadcasts appear clearly to constitute an occupation of the field by federal authority, which, under the law, would relieve the licensee of responsibility for any libelous matter broadcast in the course of a speech coming within Section 315 irrespective of the provisions of state law."
>
> "Accordingly, we are of the opinion that the prohibition of Section 315 against any censorship of licensees of political speeches by candidates for office is absolute, and no exception exists in the case of ma-

terial which is either libelous or might tend to involve the station in an action for damages."

"In reaching this conclusion, however, we hold merely that censorship prohibited under Section 315 of the Communications Act includes the refusal to broadcast a speech or part of a speech by a candidate for public office because of the allegedly libelous or slanderous content of the speech. Nothing in this opinion is intended to indicate that a licensee is necessarily without power to prevent the broadcast of statements or utterances in violation of the provisions of the Communications Act or any other federal law on broadcasts coming within the requirements of Section 315 of the Communications Act."

[fol. 45] From the opinion of the Commission quoted above it is clear that the Commission has taken the view that under Section 315 radio and television stations are obligated to offer equal opportunities to all candidates for public office to make use of their facilities without censorship. The Commission further contends that Congress has taken over the field in connection with responsibility for libelous matter as fully as it has with respect to responsibility of telegraph companies in transmitting interstate messages to the exclusion of local or state interference. Section 301 Subchapter III Provisions relating to Radio USCA Title 47 provides:

"It is the purpose of this chapter, among other things, to maintain the control of the United States over the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license." * * *

In the case of Dumont v. Carroll, 184 Fed. 2d, 153, U. S. Circuit Court of Appeals, third Circuit, (Pa) 1950 had under consideration a Pennsylvania statute, 4 P.S. Sec. 41-58 under which the Board of Censors of the state had

promulgated a regulation authorizing it to censor films used by plaintiffs in projecting television programs in the State of Pennsylvania. The court below found that the regulation was in conflict with federal authority in a field fully occupied by Congress when it enacted the Radio Act of 1927, 44 Stat. 1162., and the Communications Act of 1934, 47 U.S.C.A. et seq., and found the regulation invalid. It was found that the television programs broadcast by the plaintiffs were received by persons having television sets not only in Pennsylvania but also in the State of Maryland, New Jersey and other states. The Circuit Court of Appeals affirmed the district court and held that:

> [fol. 46] "There is no doubt but that television broadcasting is in interstate commerce. This is inherent in its very nature."
>
> * * * * * * *
>
> "The Communications Act of 1934 applies to every phase of television and it is clear that Congress intended the regulatory scheme set out by it therein to be exclusive of State action. See Section 301, 47 U. S. C. A. Section 301, which recites the purpose of the Act as inter alia, the maintenance of ' * * * the control of the United States over all the channels of interstate and foreign radio transmission.' "

The opinion concludes: "We think it is clear that Congress has occupied fully the field of television regulation and that the field is no longer open to the States. Congress possessed the constitutional authority to effect this result. Hines v. Davidowitz 312 U.S. 52, 74; 61 S. Ct. 399, 85 L. Ed. 581. It follows that the Commonwealth of Pennsylvania cannot censor the films used on the programs of plaintiff's station."

In the case of Sola Electric Co. v. Jefferson Electric Co. 317 U.S. 173, the Supreme Court of the United States said:

> "It is familiar doctrine that the prohibition of a federal statute may not be set at naught, or its benefits denied, by state statutes or state common law rules."
>
> * * * * * * *

"When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statutes to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted. To the federal statute and policy, conflicting state law and policy must yield."

* * * * * * *

"The federal courts have been consistent in holding that local rules of estoppel will not be permitted to thwart the purposes of statutes of the United States."

See also Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co. 289, U.S. 266.

It appears clear therefore under Section 301 supra of the Radio Act and the decisions in the cases cited that the Congress has taken full control of interstate radio and television communication.

The question presented in the instant case is whether under Section 315 supra, the defendant WDAY is immune from damages for broadcasting the libelous matter contained in the speech of A. C. Townley. Said statute provides that where a licensed radio station has permitted a [fol. 47] candidate for political office to use its facilities it must afford equal opportunities to all candidates for the same office; but "such licensee shall have no power of censorship over the material broadcast under the provisions of this section". If WDAY is immune from liability such immunity is a privilege granted by section 315, and is either an absolute privilege or a qualified privilege. 53 C.J.S. Libel and Slander, Sec. 88, page 143, defines Absolute Privilege as follows:

"An absolutely privileged communication is one for which, by reason of the occasion on which it is made, no remedy is provided for the damages in a civil action for slander or libel. It is well settled that the law recognizes this class of communications which is so absolutely privileged that even the existence of express malice does not destroy the privilege, although there are some

dicta denying the rule; and some eminent judges, in dealing with particular applications of the rule, have doubted or questioned the rationale or principle of absolutely privileged communications. As to absolutely privileged communications, a civil action for libel or slander is absolutely barred."

In the same volume, Section 89, pages 143-144-145 Qualified privilege is defined as follows:

"Qualified privilege exists in a larger number of cases than does absolute privilege. It relates more particularly to private interests, and comprehends communications made in good faith, without actual malice, with reasonable or probable grounds for believing them to be true, on a subject matter in which the author of the communication has an interest, or in respect to which he has a duty, public, personal or private, either legal, judicial, political, moral, or social, made to a person having a corresponding interest or duty. Briefly stated, a qualifiedly privileged communication is a defamatory communication made on what is called an occasion of privilege without actual malice, and as to such communications there is no civil liability, regardless of whether or not the communication is libelous per se or libelous per quod."

In Section 90, page 146, same volume it is stated:

"A communication must be published in connection with, and relevant and germane to, some matter involving the interest or duty. Notwithstanding the existence of a privileged occasion between the parties to a communication, an irrelevant defamatory statement concerning a third person having no connection whatever with the occasion is not privileged, but where a defamatory charge against a third person is inseparably connected with a privileged communication concerning another it will be protected by the privilege."

[fol. 48] There is no ambiguity in Section 315 supra. It provides in clear and specific language that where candi-

dates for political office are permitted to use the the facilities of a station such station "shall have no power of censorship." There are certain exceptions "and narrowly limited classes of speech, the prevention of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, and libelous and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite to an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." Beauharnais v. Illinois, 343 U.S. 250, 96 L. Ed. 919, 72 S. Ct. 725.

In the instant case the defendant WDAY was required by Section 315 to permit the broadcast of the Townley speech. Power to censor the speech was denied by the clear and specific language of Section 315. We cannot believe that it was the intent of Congress to compel a station to broadcast libelous statements and at the same time subject it to the risk of defending actions for damages.

The defendant WDAY took the precaution to advise the speaker that if certain statements in the speech were false they were libelous, and unless the speaker would make a demand under Section 315, his speech would not be broadcast over defendant's facilities. The speech was broadcast only after such demand was made by the speaker.

The plaintiff objected specifically to the following and similar statements in the Townley speech as charging it with being a communistic organization:

> "Both men (Young and Burdick) take orders from the communist controlled Democrat Farmers Union."

[fol. 49] The reference to "Communist controlled Democrat Farmers Union" is in context with the criticism by the speaker of his two opponents. The speaker was discussing the qualifications of candidates and campaign issues in which the voting public was interested. As was said in the case of Charles Parker Co. v. Silver City Crystal Co. (Conn.) 116 A (2) 440 at page 445:

> "Any political campaign is a process of debate and appeal publicly conducted in a way to bring knowledge to the voters to assist them in making a choice on election day. It is a time honored American institution indispensable in our way of life. Courts must be careful not to permit the law of libel and slander to encroach unwarrantably upon the field of free public debate."

When Congress enacted Section 315 it recognized the convenience and necessity of the general public and its right to information relative to political issues, the qualifications of candidates for public office, and their attitude on questions of grave importance affecting the general welfare of the state and nation.

It cannot reasonably be argued with any convincing force that the election of a United States Senator is not of vital importance under our form of government. The voters are entitled to all available information as to the character and qualifications of candidates for the office. Under Section 315 supra, Congress has prescribed the conditions and limitations under which broadcasting stations may permit their facilities to be used by candidates for political office. Where candidates are permitted to use the facilities of the stations, censorship by the stations of the speeches broadcast is prohibited.

Communism is a subject that is being discussed both privately and publicly by Americans and by the people of other countries. The reference to that subject in the speech challenged by the plaintiff could do no more than to put the electorate on inquiry as to the attitude of the candidates for the United States Senate toward communism. So far as the defendant WDAY is concerned it was under compulsion [fol. 50] to publish the speech by direct mandate of a federal statute. It had no choice other than to broadcast the speech. If the speech was libelous the plaintiff had its recourse and remedy against the author of the speech who delivered it through the facilities of the defendant WDAY.

The plaintiff contends that if said Section 315 is held to grant immunity to the defendant WDAY it would be unconstitutional and in violation of the Fifth and Fourteenth

Amendments to the Constitution of the United States. To this we cannot agree. Section 315 imposes a mandatory duty upon broadcasting stations to permit all candidates for the same office to use their facilities if they have permitted one candidate to use them. Since power of censorship of political broadcasts is prohibited it must follow as a corollary that the mandate prohibiting censorship includes the privilege of immunity from liability for defamatory statements made by the speakers. In fact the maxim "res ipsa loquitur" applies to the situation presented here. There is no provision in the Fifth and Fourteenth Amendments to the Constitution which prohibits Congress from either granting or denying a privilege. As we have pointed out elsewhere in the opinion, the manifest purpose of Congress in enacting Section 315 was to afford full opportunity to candidates for political office to give to the electorate and the public generally facts relative to their qualifications and fitness for the office to which they aspire.

The judgment of the district court is accordingly affirmed.

P. O. Sathre, Nels G. Johnson, Thomas J. Burke, G. Grimson, C. J.

A. C. Townley and WDAY, Inc., a corporation.

[fol. 51]

Farmers Educational and Cooperative Union of America,

v.

A. C. Townley and WDAY, Inc., a corporation.

Dissenting Opinion

Morris, J. dissenting. Radio and television broadcasting falls within the scope of federal regulatory power derived from the commerce clause of the United States Constitution. Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co., 289 U.S. 266. It also seems that liability for libel in connection with broadcast or telecast transmissions also falls within the scope of that power. O'Brien v. Western Union Telegraph Co., 113 F. 2d 539. Congress, by Section 315 of the Federal Communications

Act of 1934, has undertaken to regulate the use of broadcasting facilities by candidates for public office and prohibit to licensees the exercise of the power of censorship over material broadcast within the provisions of that section. The extent of that regulation and its legal consequences are matters to be determined under federal statutes in accordance with federal policy insofar as that policy has been established. Sola Electric Co. v. Jefferson Electric Co., 317 U.S. 173, 87 L. ed. 165.

To the extent that Section 315 deprives a licensee of the power of censorship over the material broadcast it insulates the licensee against liability for defamation. This is a corollary to the proviso of Section 315 because Congress has by the Communications Act undertaken to protect as well as [fol. 52] regulate radio and television stations in the public interest. Therefore the power of censorship provided by Congress must be evaluated and construed in the light of both the public purpose sought to be served and the age-old right of the individual to a reputation undefamed. I find a somewhat analogous situation with respect to Article I of the Amendments to the Constitution of the United States prohibiting the abridgement of freedom of speech. Even that freedom must yield to civilized society's inherent prohibitions of blasphemy, indecency and defamation. Thus words that seem unqualified must sometimes yield to qualification.

"Power of censorship" that Section 315 prohibits is the power to deny or forbid the publication in advance or to refuse to make available facilities of the licensee for such publication. Allen B. Dumont Laboratories v. Carroll, 184 F. 2d 153. Despite the positive wording of the statute this prohibition cannot under all circumstances be absolute. I do not attribute to Congress an intention to deny the right of censorship to the extent of compelling the licensee to make available to a candidate for public office its facilities for the broadcasting of obscenity or blasphemy. It follows that to the extent that censorship is not absolute, privilege under the law of libel is not absolute. Once that it is conceded that the prohibition of censorship is not absolute despite its positive language we are faced with the problem of construction that involves a determination of the intention of Congress.

A number of states have by their constitutions placed reputation within the protecting mantle of the Bill of Rights. Byers v. Meridian Printing Co., 84 Ohio St. 408, 95 N.E. 917; Osborn v. Leach, 135 N.C. 628, 47 S.E. 811, 66 L.R.A. 648; Hanson v. Krehbiel; 68 Kan. 670, 75 P. 1041, 64 L.R.A. 790, 104 Am. St. Rep. 422. See also Neafie v. Hoboken Printing & Publishing Co., 75 N.J.L. 564, 68 Atl. 146.

> "As a part of the right of personal security, the preservation of every person's good name from the vile arts of detraction is justly included. The laws of the ancients, no less than those of modern nations, made private reputation one of the objects of their protection."

Kent's Commentaries, 14th Ed. (Gould) Vol. II, p. 23. An intention to leave all reputations at the mercy of even a limited class of defamers should not be lightly ascribed. On the other hand justice to the individual may sometimes be forced to yield to the public good. In this instance, however, Congress in enacting Section 315 was not faced with a Hobson's choice and in construing that section neither are we.

When a person becomes a candidate for a public office he submits himself to a limited privilege on behalf of those who would comment on his fitness for office. Nevada State Journal Publishing Co. v. Henderson, 294 Fed. 60, 33 Am. Jur., [fol. 54] Libel and Slander, Section 169, 53 C.J.S., Libel and Slander, Section 134b. This rule springs from the fact that when a person becomes a candidate for public office his reputation for honesty and integrity as well as his qualifications and fitness for the position become matters of public interest. Radio and television licensees are mediums for the broad distribution of information. I have no difficulty in concluding that Congress by the enactment of Section 315 prohibited censorship of the material broadcast under the provisions of that section on the ground that it was defamatory of a candidate for the same office who had previously been permitted to use the broadcasting station. Perhaps Congress intended to go so far as to prohibit censorship

of the broadcast of matter defamatory of any candidate for the same office. But what of the innocent bystander?

The innocent bystander may stand in one of two categories depending on the relationship if any between the defamatory matter and the rest of the broadcast. A defamatory statement may be a digression from the political theme and have no connection with any opposing candidate. Surely Congress did not intend that a candidate broadcasting under the protection of Section 315 might charge his neighbor, John Doe, with being a thief out of context and with no relation to the campaign or to opposing candidates, free of any right of the licensee to censor the defamatory [fol. 55] statement and consequently without recourse against the disseminator on the part of the person so defamed. To that extent at least the prohibition against censorship must yield. In a second and slightly different category stands the innocent bystander whose defamation is in context and is connected by words of the broadcast with an opposing candidate. An illustration would be where a candidate is broadcasting under the provisions of Section 315 and accuses an opposing candidate of associating with thieves, one of whom is neighbor John Doe. Here again the neighbor is defamed but the defamation is by context connected with the candidate as well. This case falls within the general purview of the second illustration. The defamatory accusation that the plaintiff is Communist-controlled is connected by context with the two candidates opposing A. C. Townley, whose speech was telecast after being filmed, recorded and viewed by the employees of the defendant, WDAY, Inc. The plaintiff is an innocent third party whose reputation has been defamed under the claimed protection of the prohibition against censorship contained in Section 315. It does not appear that the public interest would be served by making the reputations of innocent third parties subject to destruction without recourse to the disseminator by an irresponsible candidate for public office broadcasting [fol. 56] under the aegis of Section 315 or that Congress intended licensees to be rendered powerless to prevent such a result.

I am not impressed by the argument that because Townley was the primary source of the defamatory material and the

licensee was merely the agency of transmission or publication Congress felt that recourse to the author afforded sufficient relief. This argument ignores the fact that defamation acquires its devastating effect through dissemination rather than authorship and that under the law of libel damages are awarded not for the utterance but for the effect.

My conclusion is that Section 315 does not afford the defendant, WDAY, Inc., a defense in law and that the trial court erred in overruling the demurrer to the second defense.

James Morris

[fol. 57] Clerk's Certificate to foregoing Opinion (omitted in printing).

[fol. 58]

IN THE SUPREME COURT OF NORTH DAKOTA

FARMERS EDUCATIONAL AND COOPERATIVE UNION OF AMERICA, NORTH DAKOTA DIVISION a corporation, Plaintiff and Appellant

v.

WDAY, INC., a corporation, Defendant and Respondent

JUDGMENT—April 3, 1958

This action coming on to be heard at the October A. D. 1957 term of this Court at the Supreme Court rooms in the City of Bismarck, State of North Dakota:

Present: Honorable G. Grimson, Chief Justice; Honorable James Morris, Honorable Thomas J. Burke, Honorable P. O. Sathre, Honorable Nels G. Johnson, Associate Justices; and the appeal herein having been argued by Messrs. Quentin N. Burdick and J. F. X. Conmy for the Appellant and argued by Mr. Harold W. Bangert for Respondent and the court having been advised thereon it is now considered,

ordered and adjudged that the judgment of the said District Court within and for said Cass County appealed from herein, be and the same is hereby Affirmed.

And It Is Further Ordered, That this cause be and it is hereby remanded to the District Court for further proceedings according to law, and the order of this court.

And It Is Further Considered And Adjudged, That Respondent have and recover of the Appellant costs and disbursements on this appeal expended, to be taxed and allowed in the District Court.

Dated April 3, 1958

By the Court, G. Grimson, Chief Justice.

Attest: J. H. Newton, Clerk
(Seal)
(North Dakota)
(Supreme Court)

[fol. 59]
State of North Dakota,
In the Supreme Court. *ss.*

I, J. H. Newton, Clerk of the Supreme Court, within and for the State of North Dakota, do hereby certify that the above and foregoing is a full, true, correct and complete copy of the order of the Supreme Court of the State of North Dakota, in the above entitled action, and the same is transmitted to the District Court in and for the County of Cass, State of North Dakota, as the Remittitur herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court this 21st day of April A. D. 1958.

(Seal)

Luella Dunn, Deputy Clerk.

Fees, Clerk of Supreme Court, taxed and allowed at $15.00 paid by appellant.

[fol. 60]

IN DISTRICT COURT OF CASS COUNTY

[Title omitted]

NOTICE OF ENTRY OF JUDGMENT ON REMITTITUR & RETAXATION OF COSTS

To the Above Named Plaintiff and to Quentin N. Burdick, Fargo, North Dakota, Its Attorney:

You will please take notice that Judgment was duly made, entered, docketed and filed in the above entitled action on the 8 day of May, 1958, in favor of the defendant and against the plaintiff above named, affirming the Judgment of the District Court previously entered herein and for the costs in favor of the defendant, WDAY, Inc., in the amount of $37.00, and hereto attached and herewith served upon you is a true and correct copy of the Order for Judgment, and Judgment so entered, docketed and filed and also a Statement of Costs and Disbursements showing the costs taxed and allowed by the Clerk of this Court and inserted in said Judgment.

You will please further take notice that the said costs in this action will be retaxed and allowed before Theo. L. Hanson, Clerk of the District Court in his office in the Court House in the City of Fargo, County of Cass, State of North Dakota, at the hours of 10:00 o'clock A.M. in the forenoon on the 12 day of May, 1958 or as soon thereafter as counsel may be heard.

Dated this 5th day of May, 1958.

Harold W. Bangert, a member of the firm, Bangert & Bangert, 400 American Life Building, Fargo, North Dakota, Attorneys for the Defendant, WDAY, Inc.

[fol. 61]

IN DISTRICT COURT OF CASS COUNTY

FARMERS EDUCATIONAL AND COOPERATIVE UNION OF AMERICA, NORTH DAKOTA DIVISION, a corporation, Plaintiff,

v.

A. C. TOWNLEY and WDAY, INC., a corporation, Defendant.

ORDER FOR JUDGMENT ON REMITTITUR—May 5, 1958

The plaintiff above named having appealed to the Supreme Court of the State of North Dakota from the judgment of this Court in this action entered on the 23rd day of May, 1957, in favor of the defendant, WDAY, Inc., and upon such appeal the Supreme Court having affirmed the judgment of this Court and remittitur from the Supreme Court having been filed in this Court, and it appearing on the trial that the Court found in favor of the defendant, WDAY, Inc., dismissing the plaintiff's complaint, and adjudging that WDAY, Inc. is not liable for a claimed defamation of the plaintiff, the inhibition against censorship imposed on broadcasting stations by Section 315, Title 47, USCA, granting immunity to such stations from liability for defamatory statements made by candidates where such statements are germane to the political issues discussed by such candidates, it is now upon motion of Bangert & Bangert, Attorneys for the defendant, WDAY, Inc.,

Ordered, Adjudged, And Decreed, That the judgment entered in this action dated the 23rd day of May, 1957, in favor of the defendant, WDAY, Inc., against the above named plaintiff be, and the same is hereby affirmed in all respects. It is further

Ordered, Adjudged and Decreed That the plaintiff's complaint be and it is hereby dismissed with prejudice and on the merits.

Let Judgment Be Entered in accordance with the attached form of judgment which is hereby approved.

[fol. 62] Dated this 5 day of May, 1958.

By the Court: John C. Pollock, Judge of the District Court.

[fol. 63]

IN DISTRICT COURT OF CASS COUNTY

FARMERS EDUCATIONAL AND COOPERATIVE UNION OF AMERICA, NORTH DAKOTA DIVISION, a corporation, Plaintiff,

v.

A. C. TOWNLEY and WDAY, INC., a corporation, Defendant.

JUDGMENT ON REMITTITUR—May 8, 1958

The plaintiff above named having appealed to the Supreme Court of the State of North Dakota from the Judgment of this Court in this action entered on the 23rd day of May, 1957, and upon appeal the Supreme Court having affirmed Judgment in all respects and the Remittitur from the Supreme Court having been filed in this Court and the Court having filed its order for Judgment herein pursuant to said Remittitur, it is now in accordance therewith,

Ordered, Adjudged, and Decreed, as follows:

I.

That the Judgment entered in this action dated the 23rd day of May, 1957, in favor of the above named defendant, WDAY, Inc., and against the above named plaintiff be in the same as hereby affirmed in all respects.

II.

That plaintiff's complaint be in the same as hereby dismissed with prejudice and upon the merits.

III.

That the defendant, WDAY, Inc., is not liable for a claim of defamation of the plaintiff, the inhibition against censorship imposed on broadcasting stations by Section 315, Title 47, USCA, granting immunity to such stations from liability for defamatory statements made by candidates where such statements are germane to the political issues discussed by such candidates.

[fol. 64] IV.

That the defendant, WDAY, Inc., do have and recover judgment from and against the above named plaintiff in the sum of $37.00, costs and disbursements on appeal to the Supreme Court, as taxed and allowed by the Clerk of the Court.

Witness, The Honorable John C. Pollock, Judge of the said District Court, and my hand and the seal of this Court this 8 day of May, 1958.

Theo. L. Hanson, Clerk of the District Court

(Seal)

[fol. 65]

STATEMENT OF COSTS AND DISBURSEMENTS

(Omitted in Printing)

[fol. 67] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 68]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—June 12, 1958

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 6th, 1958.

Charles E. Whittaker, Associate Justice of the Supreme Court of the United States.

Dated this 12th day of June, 1958.

[fol. 69]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING CERTIORARI—October 13, 1958

The petition herein for a writ of certiorari to the Supreme Court of the State of North Dakota is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.